2004

Stephen Clarke v. Living Scriptures, Inc., a Utah corporation : Brief of Appellee

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STEPHEN CLARKE, Plaintiff & Appellant, vs. LIVING SCRIPTURES, INC., a Utah corporation, Defendant & Appellee.	BRIEF OF APPELLEE, LIVING SCRIPTURES, INC. Case No. 20040381-CA

APPEAL FROM SUMMARY JUDGMENT ENTERED IN CASE NO. 030928443
IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE STEPHEN L. HENRIOD, DISTRICT JUDGE

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LIST OF PARTIES

1. Stephen Clarke, an individual residing in Utah County, State of Utah. Plaintiff below and Appellant.

2. Living Scriptures, Inc., a Utah corporation with its principal place of business in Salt Lake County, State of Utah. Defendant below and Appellee.

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APPELLEE'S BRIEF

I. STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2-2(3)(j) and Rule 4 of the Utah Rules of Appellate Procedure.

II. ISSUES PRESENTED AND STANDARD OF REVIEW

A. Did the district court err in finding that the six-year statute of limitations on a claim for breach of a written employment contract ran from the time of the breach, when written notice of termination was delivered, and not from the date that the termination became effective?

Standard of Review: The trial court's conclusions of law are accorded no particular deference and the appellate court reviews such conclusions for correctness. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *Harline v. Baker*, 912 P.2d 433, 438 (Utah 1996); *State v. Pena,* 869 P.2d 932, 936 (Utah 1994).

III. CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

UTAH CODE. ANN. § 78-12-23 is determinative and central to the issue on appeal. That section states:

An action may be brought within six years: . . .

(2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22 [judgment or decree of any court of the United States or of any state or territory within the United States].

IV. STATEMENT OF THE CASE

A. Procedural and Factual Background

On December 23, 2003, Stephen Clarke filed a Complaint in the Third Judicial District Court, State of Utah against Living Scriptures. [Record ("R.") 1-17.] The Complaint asserted claims for breach of employment contract, unjust enrichment, detrimental reliance, bad faith, fraudulent misrepresentation, lost business opportunity, breach of the implied covenant of good faith and fair dealing, and punitive damages. [R. 1-17.] In response, Living Scriptures filed a motion pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure seeking dismissal of the action on the grounds that it did not state a claim upon which relief could be granted. [R. 20-31.] The basis of Living Scripture's motion was that each of Clarke's claims was barred by the applicable statute of limitations. [Record 23-31.] In his Opposition Brief, Clarke conceded that most of his claims were barred, but argued that his breach of contract claims were timely. [Record 53-62.] Clarke also argued that, despite his concession that his tort claims were barred, his separate claim for punitive damages should not be dismissed. [R. 53-62, at pp. 60.]

After argument on the motion, the trial court granted Living Scripture's Motion to Dismiss the Complaint by Order dated April 12, 2004 ("Order of Dismissal"). [R. 76-78.] Clarke filed this appeal, seeking reversal of the trial court's Order of Dismissal. Because the breach of contract claim accrued more than six years before Clarke filed his Complaint, the Order of Dismissal should be affirmed.

For purposes of the motion to dismiss and this appeal, all of the allegations contained in the Complaint are deemed true. *See, e.g., Riddle v. Perry,* 2002 UT 10, ¶ 2, 40 P.3d 1128, 1130-31 (Utah 2002); *Clark v. Deloitte & Touche LLP,* 34 P.3d 209, 210 (Utah 2001). Clarke alleges that he began working for Living Scriptures as a college student in 1989 and continued with the company thereafter. On April 7, 1997, he entered into a written contract with Living Scriptures in which he was classified as an independent contractor. [R. 1-17, at ¶ 20.] Subsequently, in August of 1997, Clarke was hired as the Provo Division Manager, but continued to operate under the existing written contract. [*Id.* & ¶ 24.] Clarke claims that his new management duties resulted in a reduction of time dedicated to selling Living Scriptures' product and thereby reduced his sales commission income. [R. 17, at ¶ 16.] He also claims to have received oral assurances of a future with the company. [*Id.* at ¶ 26.]

On December 9, 1997, a letter ("Notice of Termination") was hand-delivered to Clarke which stated:

> **This letter is your written notice that we are terminating the Independent Salesman Agreement that we have with you effective 15 days from the above date.** Please prepare and submit to us a list of all pending, unfinished business involving sales of the Company products. This action is taken as per section 10 of the Independent Salesman Agreement you signed on April 7, 1997.

[R. 1-17, at ¶ 28 (emphasis added).][1] The Independent Salesman Agreement ("Agreement") had a one-year term which would be automatically renewed unless terminated by either party. Paragraph 10 of that Agreement gave Living Scriptures the right to terminate Clarke "upon the Salesman's failure to abide by the terms hereof or upon his failure to meet the minimum sales requirement, which is $3,000 of merchandise per month." [R. 1-17, at ¶ 20.][2] Clarke claims that he was "either excused from his sales responsibility or prevented from undertaking any sales," and that his sales averaged over $3,000 per month. [R. 1-17, at ¶ 35-36.] Although Clarke makes factual allegations in his appeal brief relating to his activity after the Notice of Termination was delivered, there is no evidence in the record or any allegation in the Complaint that supports those

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[1]Although Clarke indicated that a copy of the Notice of Termination was attached as an exhibit to the Complaint, it was not attached and is not part of the record on appeal.

[2]The Agreement also provided for fifteen days notice of termination. [R. at p. 7, ¶ 34.]

allegation. *See,* Appellant's Brief, at p. 7, ¶ 10. Clarke makes reference in his Opposition below to an affidavit concerning these activities, but no affidavit was ever filed with the trial court and there is no affidavit in the record on appeal. [*Compare,* R. 54, *with* R. 1-85.]

Accepting each of the allegations in the Complaint as true, Clarke's breach of contract claims are barred by the six-year statute of limitations and the Motion to Dismiss was properly granted.

V. SUMMARY OF ARGUMENTS

A. A Contract Claim Accrues at the Time of the Breach.

In Utah, an action for breach of a written contract must be brought within six years of the time the cause of action accrued. A cause of action for breach of contract accrues at the time of the breach, whether or not damages are immediately realized. Here, the breach, if any, occurred on December 9, 1997 when Living Scriptures delivered written notice to Clarke terminating his employment. The written Notice of Termination unconditionally stated that Clarke was fired from his position. He had all the information he needed at that moment to pursue a legal action against Living Scriptures and the statute of limitations began to run.

B. Clarke Did Not File His Complaint Within Six Years of the Breach.

The Notice of Termination was delivered to Clarke on December 9, 1997, giving him until December 9, 2003 to bring his breach of contract claim. The Complaint was not filed until December 23, 2003 and is therefore barred.

VI. ARGUMENT

The sole issue before this Court is when the statute of limitations began to run on Clarke's breach of contract claim against Living Scriptures. Living Scriptures maintains that the action is barred because the claim accrued and the statute began to run on the date the written Notice of Termination was delivered, December 9, 1997. Because termination was "effective 15 days from" the date of the written Notice of Termination, Clarke claims that he had until December 24, 2003 to file the Complaint. The determination of when the cause of action accrued is essential to the resolution of this dispute.

A. A Claim For Breach of Contract Accrues at the Time of the Breach.

The Utah legislature has indicated that the limitations periods established for various causes of action begin to run at the time the claim accrues.

> Civil actions may be commenced only within the periods prescribed in this chapter, **after the cause of action has accrued**, except in specific cases where a different limitation is prescribed by statute.

UTAH CODE ANN. § 78-12-1 (emphasis added). In Utah, a claim for breach of contract accrues for purposes of triggering the statute of limitations at the time of the breach, whether or not damages are immediately incurred. *E.g., S & G, Inc. v. Intermountain Power Agency,* 913 P.2d 735, 740 (Utah 1996); *Upland Industries Corp. v. Pacific Gamble Robinson Co.,* 684 P.2d 638, 643 (Utah 1984); *Butcher v. Gilroy,* 744 P.2d 311, 313 (Utah Ct. App. 1987).

That distinction was recognized by this Court in *S & G*, where the plaintiff sought recovery against Intermountain Power Agency ("IPA") on a series of theories, including breach of contract. *S & G* agreed to sell all of the water appurtenant to land in Delta, Utah to IPA for municipal culinary purposes. The purchase price was to be determined by a set dollar amount per acre foot. The contract also provided that if the state engineer, or the Utah courts on review of the engineer's decision, failed to quantify the amount of water sold, the parties would presume 912 acre feet for purposes of calculating the amount due to *S & G*. 913 P.2d at 737. On September 10, 1984, the state engineer set the quantity at 775.2 acre feet. *S & G* believed that quantity was too low and requested that IPA file an action challenging the engineer's decision. IPA refused and *S & G* attempted to bring the action on its own behalf. Eventually, *S & G* was found to be without standing to challenge the engineer's decision. On July 3, 1992, IPA paid *S & G* for the

775.2 acre feet set by the engineer and waived all claims against IPA, except those arising from its failure to file suit challenging the engineer's quantity assessment. On March 27, 1992, *S & G* filed a complaint claiming that IPA breached the contract between the parties by failing to seek judicial review of the state engineer's decision. The trial court granted summary judgment in favor of IPA on the grounds that *S & G's* action was barred by the statute of limitations and *S & G* appealed.

S & G claimed that its breach of contract cause of action did not accrue for purposes of triggering the statute of limitations until after its appeal of the state engineer's decision was concluded unsuccessfully. The Utah Supreme Court disagreed, holding that "a contract action ordinarily accrues at the time of the breach." 913 P.2d at 740 (*quoting Upland Industries,* 684 P.2d at 643; *Koulis v. Standard Oil Co. of California,* 746 P.2d 1182, 1186 (Utah Ct. App. 1987)). This Court concluded that the breach occurred in 1984 when IPA failed to file the appeal and expressly rejected *S & G's* argument that the limitations period did not commence until after *S & G's* unsuccessful appeal when damages could be ascertained.

> *S & G's* present appeal admittedly presents a rare circumstance where *S & G's* asserted damages may not have been entirely measurable until several years after the purported breach. Nevertheless, *S & G* should have been aware that an unfavorable ruling in *Morgan* [the case *S & G* brought to appeal the engineer's decision] would provide the very damages it now claims.

913 P.2d at 741 n.6. Thus, the *S & G* Court held that the action for breach of contract was barred because it was not brought within six years of the breach.

As in *S & G*, Clarke's breach of contract claim accrued for purposes of the statute of limitations at the time of the breach. That event occurred, if at all, when the Notice of Termination was delivered to Clarke. At that moment, he understood that his employment was terminated. [R. at 1-17, at ¶ 66.] To the extent the termination was not appropriate under his Agreement, it was apparent at that moment and he could have immediately initiated legal proceedings. This is true even if the damages were not fully ascertainable at that time.

B. Most Courts Hold that the Claim Accrues at the Time Notice of Termination is Communicated to the Employee, Even if Employment or Benefits Continue Beyond that Date.

The majority of courts that have considered this issue under facts similar to those present here have found that a cause of action accrues for breach of an employment contract at the time notice of termination is given, even if the effective date of the termination is later. *See e.g., Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 134 (5th Cir. 1992) (limitations period commences when the employee receives unequivocal notice of his termination); *Eisenberg v. Insurance Company of North America,* 815 F.2d 1285, 1292 (9th Cir. 1987) (limitations period commences upon notice of termination even if

employment continues past that date); *Walch v. University of Montana*, 861 P.2d 179, 182-83 (Mont. 1993) (limitations period commences from notice of discharge even if employment continues beyond that date); *Callender v. Suffolk County,* 783 N.E.2d 470, 473 (Mass. Ct. App. 2003) (limitations period commenced at time employee notified of discontinuation of benefits); *Stephenson v. American Dental Assoc.,* 789 A.2d 1248, 1252 (D.C. Ct. App. 2002) ("The fact that his last day of work was to be sixty days after notice of termination does not negate the injury unquestionably experienced at the moment of notice."); *City of East Point v. Seagraves,* 524 S.E.2d 755, 756 (Ga. Ct. App. 1999) (limitations period commences at time of breach even if damages not yet incurred); *Luna v. Frito-Lay, Inc.,* 726 S.W.2d 624, 628 (Texas Ct. App. 1987) (discharge occurred and action accrued when employee informed company could not use him anymore); *Montalban v. Puerto Rico Marine Management, Inc.,* 774 F. Supp. 76, 78 (D. Puerto Rico 1991) (limitations period commences upon notice); *Riggs v. Boeing Company,* 12 F. Supp. 2d 1215, 1217 (D. Kan. 1998) (action accrued at time of notice of termination); *Farmer v. City of Fort Lauderdale,* 814 F. Supp. 1101, 1102 (S.D. Fla. 1993) ("It is well established that in cases which challenge employment termination decision, the applicable limitations period begins to run when notice of termination was given and not on the date when employment actually terminated."); *Chapman v. HOMCO, Inc.,* 708 F.Supp. 787,

790 (N.D. Texas 1988) ("In a case alleging an unlawful discharge, the statute of limitations commences when the employee is notified that his employment is to be terminated.").

The United States Supreme Court considered this issue in *Delaware State College v. Ricks,* 449 U.S. 250 (1980). On June 26, 1974, the College informed Ricks that he had been denied tenure, but offered him a contract to teach one additional year. On September 9, 1977, after the completion of the one-year teaching contract, Ricks filed a complaint against Delaware State College, claiming that he was denied tenure on the basis of his race and national origin. The trial court granted the College's motion to dismiss the complaint as untimely because it had not been filed within 180 days "after the alleged unlawful employment practice occurred" as required by Title VII. 42 U.S.C. § 2000e-5(e). The Court of Appeals for the Third Circuit reversed, finding that the limitations period did not begin to run until the one-year teaching contract expired on June 30, 1975. On certiorari, the United States Supreme Court reversed the Third Circuit and reinstated the trial court's order of dismissal, stating "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." 449 U.S. at 257. The *Delaware State College* Court held that the only alleged discrimination occurred at the time the tenure decision was

communicated to Ricks even though the effects of that denial were not felt until later. 449 U.S. at 258. *See also, Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (limitations period ran from notice of termination not from last date of employment).

The same analysis is applicable to the claims asserted by Clarke. The Notice of Termination was unequivocal. And, as is reflected in the Complaint, Clarke understood that he was terminated as of that moment.

> [I]n spite of all of plaintiff's work, time, energy, enthusiasm and efforts toward improving the performance and profitability of defendant, **on December 9, 1997,** without warning, hint or as much as an admonition, **defendant abruptly and illegally terminated plaintiff's employment.**

[R. 1-17, at ¶ 66.]

Indeed, Clarke claims that after "he was given the notice of termination, [he was] instructed to clean out his desk and marched out the front door of the business." [R. 54, at ¶ 5.][3] At that time, Clarke was "rather unceremoniously informed that Living [Scriptures] no longer desired to associate with him." *Id.* At that moment, Clarke knew without doubt that he had been fired. If it was a breach of the Agreement to terminate Clarke, that

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[3]Although this admission appears in Clarke's Opposition Brief below and not in the Complaint, the trial court should be permitted to rely upon it. "An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it." *Baldwin v. Vantage Corp.,* 676 P.2d 413, 415 (Utah 1984) (citing, *Yates v. Large,* 585 P.2d 697, 699-700 (Or. 1981); *Paul Schoonover, Inc. v. Ram Construction, Inc.,* 630 P.2d 27, 28 (Ariz. 1981)).

breach occurred and the cause of action for breach of contract accrued on December 9, 1997 when Living Scriptures terminated Clarke's employment. *See, e.g., Naton v. Bank of California,* 649 F.2d 691, 695 (9th Cir. 1980) (where unequivocal notice of termination and the last day of work coincide, the statute of limitations begins to run on that date even if benefits continue for some period of time); *Bonham v. Dresser Industries, Inc.,* 569 F.2d 187, 191 (3rd Cir. 1977) (same). By Clarke's own admission, he was given the Notice of Termination, told to clean out his desk, and marched out the door on December 9, 1997. [*See,* Opposition Brief, R. 53-62, at p. 2, ¶ 5.]

Furthermore, the fact that some of the cases relied upon by Living Scriptures arise in the context of federal employment laws does not dilute their persuasiveness in a breach of contract action. While the federal analysis is concentrated on when the discriminatory act occurred, the breach of contract inquiry is focused on the time of the breach. In both instances, there is an act that is alleged to be contrary to the employer's legal obligation–a breach of law or of contract. When that event occurs, the limitations period commences. Thus, the federal analysis is consistent with that applied in a breach of contract context.

Here, Clarke identified December 9, 1997 as the specific date upon which he was fired. [R. 17, at ¶ 66.] His claim is that it was a breach of the written employment agreement to terminate his employment. Thus, because Clarke knew on December 9,

1997 that he had been let go, he also knew that according to his interpretation of the Agreement, it had been breached. Clarke waited over six years from that date to file this action and his claims are barred.

C. The Utah Cases Cited By Clarke Are Not Contrary to A Finding that the Claim for Breach of Contract Accrued at the Time Notice Was Communicated to Clarke.

The Utah cases cited by Clarke do not mandate a different result. For example, Clarke's reliance on *DOIT, Inc. v. Touche, Ross & Co.,* 926 P.2d 835, 843 (Utah 1996), is misplaced. There, this Court held that each of the claims asserted by a group of plaintiffs that had lost money on deposit with failed thrift institutions sounded in tort, not contract.

> The trial court found that plaintiffs' breach of contract and breach of warranty claims were "simply rephrased negligence claims," and thus "they too are subject to a four year limitations period." We agree.

926 P.2d at 842 n. 13. With respect to the tort claims, the *DOIT* Court held that the limitations period had been tolled by the Thrift Settlement Financing Act adopted by the Utah legislature. Consequently, it was not necessary to determine when the tort claims actually accrued. 926 P.2d at 842.

The accrual issue was addressed, however, in a later section of the opinion which dealt with plaintiffs' state securities claims. The *DOIT* plaintiffs argued that the limitations period did not commence "until it became apparent that they would not

receive the return of their deposits" on March 12, 1987 when the State abandoned the attempt to rehabilitate the thrifts and instead began liquidation efforts. 926 P.2d at 842. This Court rejected that argument, holding that the securities claims arose when the accountant's allegedly false and misleading audit reports were issued. Because the latest of these reports was delivered July 31, 1986, the *DOIT* Court affirmed the trial court's summary judgment in favor of Touche Ross on the grounds that the statute of limitations had expired. That result does not suggest a delay of the running of the statute of limitations in this case.

The analysis in *DOIT* focused first on the nature of the cause of action at issue. Then, based on whether the claim sounded in tort, contract, or was created by statute, the Court determined when that particular claim accrued and the limitations period commenced. Clarke's only remaining claims here are for breach of contract. He admits that his tort claims are barred. [R. at 59.] A tort claim accrues at the time of the happening of the last element necessary to bring a claim, including damages. *See, e.g., Retherford v. AT&T Communications,* 844 P.2d 949, 975 (Utah 1992); *Davidson Lumber Sales, Inc. v. Bonneville Investments, Inc.,* 794 P.2d 11, 19 (Utah 1990). A breach of contract claim, however, accrues at the time of the breach and can be brought even when damages are uncertain. *See, e.g., S & G,* 913 P.2d at 741 n.6. Indeed, the damages recoverable for a

breach of contract action may be no more than nominal and still support the claim. *See, e.g., Bair v. Axiom Design, LLC,* 2001 UT 20, ¶ 18, 20 P.3d 388, 392 (Utah 2001); *Fashion Place Associates v. Glad Rags, Inc.,* 754 P.2d 940, 942 (Utah 1988); *Alta Health Strategies, Inc. v. CCI Mechanical Service,* 930 P.2d 280, 286 (Utah Ct. App. 1996).

In *Bair,* this Court reversed the trial court's dismissal of the plaintiff's breach of contract action, holding that even if the liquidated damages provision of the subject contract was unenforceable, the contract claim would still lie:

> [I]t is well settled that "**nominal damages are recoverable upon breach of contract if no actual or substantial damages resulted from the breach** or if the amount of damages has not been proven." *Turtle Mgmt., Inc. v. Haggis Mgmt,, Inc.*, 645 P.2d 667, 670 (Utah 1982) (citing, *Gould v. Mountain States Tel & Tel. Co.,* 6 Utah 2d 187, 193, 309 P.2d 802, 805 (1957); *Thompson v. Andersen,* 107 Utah 331, 336, 153 P.2d 665, 667 (1944); 22 Am.Jur.2d *Damages* § 9 (1965)).

20 P.3d at 392-93 (emphasis added). This is true because the gravamen of a breach of contract claim is the breach itself. Thus, even if Clarke's damages could not be precisely identified at the time he received the Notice of Termination, he had a fully-accrued cause of action for breach of contract on December 9, 1997 when Living Scriptures allegedly "abruptly and illegally terminated plaintiff's employment." [R. 1-17, at ¶ 66.]

Furthermore, the damages alleged in the Complaint were all known to Clarke on December 9, 1997 when he received the Notice of Termination. Clarke claims $95,000

per year for six years in lost sales commissions, $150,000 for the use of his "ideas, concepts and plans" allegedly communicated to Living Scriptures prior to December 9, 1997, $22,463.61 for renovation costs of his home office, a VCR for the Ogden Mall location, and for recruiting efforts all incurred before December 9, 1997, $250,000 for serving him with the December 9, 1997 Notice of Termination in bad faith, and $40,000 for the sales opportunities he allegedly lost by accepting a management position. [R. 1-17, at ¶¶ 40, 51, 58, 67, 85.] Each of these alleged damages was as identifiable on December 9, 1997 as they were when Clarke filed his Complaint over six years later. Contrary to his assertions that "any claim for breach of contract was not ripe," Appellant's Brief, at p. 10, Clarke could have initiated a lawsuit against Living Scriptures immediately upon receipt of the Notice of Termination. His decision not to do so for over six years after he was marched out of Living Scriptures' offices is fatal to his breach of contract claim and the Order of Dismissal should be affirmed.

Likewise, this Court's decision in *Davidson Lumber* has no application here. *See,* Appellant's Brief, at p.10. Bonneville designed a beam that it sold to Davidson Lumber. The beam was eventually installed in a building leased to Thrifty Corporation and operated as a drugstore. On October 20, 1978, the roof of the building collapsed, causing significant damage to Thrifty. On May 21, 1979, Thrifty sued a number of defendants in

California, including Davidson. While that action was pending, Davidson initiated a lawsuit in Utah because it could not obtain personal jurisdiction over Bonneville in the California action. Thereafter, Davidson settled the claims asserted by Thrifty for $45,000 and sought to recover that amount from Bonneville in the Utah lawsuit. Bonneville moved for summary judgment on the grounds that Davidson's claim was barred by the statute of limitations provided by the Uniform Commercial Code ("UCC") because it was brought more than seven years after Davidson purchased the beam from Bonneville. The trial court denied summary judgment and the Utah Supreme Court entertained an interlocutory appeal. Because Thrifty was not a purchaser of the beam, but merely the tenant of a building in which the beam had been installed, this Court held that the action was not governed by the UCC. The *Davidson* Court found that "the damages it [Thrifty] sought were not for breach of contract or breach of a U.C.C. warranty, but for the commission of a tort." 794 P.2d at 13. Concluding that "[a] tort cause of action accrues when it becomes remediable in the courts, that is, when all elements of a cause of action come into being," this Court held that the limitations period did not commence until the payment of the $45,000 by Davidson to settle the California lawsuit. 794 P.2d at 19 (emphasis added). The Court also found that Davidson's claim to recover the $45,000 paid to settle that California action was a common-law indemnity claim that sounded in

implied contract. Because "[a] common law indemnity claim does not arise when the underlying damage occurs; rather it runs from the time of the payment of the underlying claim or payment of a judgment or settlement," the *Davidson* Court held that the action was timely. *Id.* (citations omitted).

There is nothing about the *Davidson* decision that would delay the commencement of the limitations period in this case. Clarke admits that all of his tort claims were barred years before he filed this action. Furthermore, there is no claim here for common law indemnity. The claims at issue sound in contract and accrued at the time of breach on December 9, 1997. The Complaint was not filed within six years of that date and they are barred as a matter of law.

Retherford is equally unhelpful to the analysis required in the case at bar. *See*, Appellant's Brief, at p. 13. Retherford brought an action against AT&T, claiming that her employment had been wrongfully terminated in violation of public policy. AT&T sought and obtained summary judgment on the grounds that the action was barred by the statute of limitations. On appeal, this Court first identified the rule applicable to that type of action: "A tort cause of action accrues when all its elements come into being and the claim is actionable." 844 P.2d at 975 (emphasis added). It then applied that rule in the context of plaintiff's claim for intentional infliction of emotional distress, recognizing

that one of the elements of such a claim is "extreme emotional distress." Because this level of distress does not "so much occur as *unfold*," the Court concluded that Retherford did not experience extreme emotional distress and her tort action did not accrue until she took medical leave from her job upon the advice of her treating psychiatrist. 844 P.2d at 976. Interestingly, the Court did not delay the commencement of the limitations period for the additional five months that Retherford continued on medical disability before her employment with AT&T was actually terminated. 844 P.2d at 957.[4]

A breach of contract action, unlike one for the tort of intentional infliction of emotional distress, does not unfold; it occurs. In this case that breach occurred, if at all, on December 9, 1997 when Clarke was given written notice that his contract was terminated and marched unceremoniously out of the office. At that moment, "all the actionable elements on the cause of action [were] complete and present." *See,* Appellant's Brief, at p. 14. Likewise, the delivery of the Notice of Termination was the

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[4]Clarke's reliance on the negligent employment section of the *Retherford* decision is also misplaced. The Court applied the same limitations period to that claim only because AT&T "did not advance the argument before this court or the trial court," that the negligent employment claim accrued before the separate cause of action for intentional infliction of emotional distress. 844 P.2d at 977. The *Retherford* Court acknowledged, however, that "one might argue that the statute of limitations against the employer for negligent employment should begin to run before the statute begins to run on the tort by the employee." *Id.*

"happening of the last event necessary to . . . the cause of action." *Brigham Young University v. Paulsen Construction Co.,* 744 P.2d 1370, 1373 (Utah 1987) (citations omitted) (holding that a claim for breach of a construction contract accrues at the time of completion of the project). Clarke waited over six years from the moment his breach of employment contract claim became actionable and his claim is barred.

The Colorado Supreme Court used a claim-specific analysis to consider facts similar to those before this Court in *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo. 1992) (*en banc*). Lorenz sued Martin Marietta claiming that he had been discharged in violation of public policy. One of the issues on appeal was whether the claim was barred by the statute of limitations. The determination of the matter was governed by whether the limitations period commenced when Lorenz was notified that he would be laid off on July 22, 1975 or on his last day of employment on July 25, 1975. To answer that question, the Colorado Supreme Court first concluded that a claim for wrongful discharge under the public-policy exception to the employment at-will doctrine "sounds in tort." 823 P.2d at 115. The *Matin Marietta* Court then relied upon the general rule that "[a] cause of action in tort does not accrue until there is a concurrence of tortious conduct and actual injury or damages caused by the tortious conduct." Because Lorenz did not sustain any damage associated with the tortious conduct until he was actually removed from his

job, the Court held that the statute of limitations on the tort claim commenced on July 24, 1975 and the action was timely. Indeed, the Colorado Supreme Court distinguished the federal cases on the basis that the test for accrual in a tort action was different than provided by statute, stating:

> Clearly, **a statutory claim for redressing an unfair employment practice, which itself may be the basis for legal redress** without regard to any ensuing loss of employment, is **analytically distinct from the common law tort of wrongful discharge, which requires actual injury in the form of loss of employment as an essential element of the tort**. The test for determining the accrual date of the former is also analytically distinct from the test applicable to the later.

823 P.2d at 116 (citations omitted; emphasis added).

If the *Martin Marietta* reasoning is applied to the facts of this case the result would be the opposite. A breach of contract claim, like an action under a federal employment statute, does not require damage as an element of the claim. The test for determining accrual is distinct from the test for accrual in a tort action. Because the breach of contract claim accrues upon breach, the limitations period commences at that time, whether or not damages have yet been experienced. Clarke waited too long after the breach to file his action and it is barred.

D. This is Not a Case of Anticipatory Breach.

The attempt to couch this action as a case of anticipatory breach should be rejected. Clarke relies on *Kasco Service Corp. v. Benson,* 831 P.2d 86 (Utah 1992), for his argument that the statute of limitations did not run until fifteen days after he received the Notice of Termination. *See,* Appellant's Brief, at pp. 19-21. The defendant in *Kasco*, Benson, was an employee of Keene Corporation. Pursuant to a 1982 written employment contract, Benson was subject to an eighteen-month non-competition clause. In 1988, Keene merged with Kasco and all of Keene's rights and obligations under the contract were assigned to Kasco. 831 P.2d at 87. As part of that merger, Kasco sent new employment contracts to all of Keene's employees, including Benson. The 1988 agreement included a non-competition covenant like the one in the 1982 contract. Benson refused to sign the 1988 agreement, asserting that the covenant not to compete was "null and void." Benson continued to work for Kasco until March 1, 1989. Upon leaving Kasco, Benson immediately started a competing business. Kasco sued and obtained a preliminary injunction against Benson. The trial court, however, determined that the eighteen-month period during which Benson could not compete ran from August of 1988 when he refused to sign the new contract with Kasco. This Court accepted

Kasco's interlocutory appeal and modified the injunction to run from March 1, 1989 when Benson left Kasco.

In reaching the conclusion that the actual termination date controlled, the *Kasco* Court relied upon the express language of the 1982 covenant which stated that the eighteen-month time frame began to run "after termination." 831 P.2d at 89. The Court also concluded that:

> **We need not decide here whether Benson's announcement** that he did not intend to abide by the noncompetition covenant **was anticipatory repudiation. It makes no difference in this case.**

831 P.2d at 89. Despite that caveat, Clarke contends that *Kasco* stands for the proposition that the Notice of Termination was only an anticipatory breach that gave him the option of suing immediately or waiting until after the fifteen-day notice period expired. *See*, Appellant's Brief, at pp. 21-22. The *Kasco* decision does not support that result. Although Benson expressed an opinion in August of 1988 that the covenant not to compete was unenforceable, he had not yet done anything to breach that covenant. It was not until after Benson left Kasco, that he started a business in direct competition and began recruiting accounts from Kasco's customer list. The *Kasco* Court did not rule on whether the statements made by Benson rose to the level of an anticipatory breach of the contract. Rather, the Court concluded that if an anticipatory breach had occurred it would

give Kasco the right, but not the obligation, to sue immediately. Under the facts of that case, the Court concluded that the non-compete obligation did not arise until "after termination" as provided in the 1982 agreement. Thus, there could be no actual breach until that time and the claim was timely.

In this case, the Notice of Termination manifested more than an intent to breach the contract sometime in the future. On December 9, 1997, Clarke received written notification that his employment was terminated. There was nothing anticipatory about that decision. Indeed, Clarke alleges that "**on December 9, 1997, without warning, hint or as much as an admonition, [Living Scriptures] abruptly and illegally terminated [Clarke's] employment**." [R. 1-17, at ¶ 66.] Clarke obviously understood that he was fired on December 9, 1997. Consequently, the breach occurred at that time and the limitations period commenced. Over six years passed before Clarke initiated this action and the trial court was correct in holding that it is barred.

E. Utah Should Not Follow the California Decisions Cited by Clarke.

Clarke correctly states that the California Supreme Court has ruled contrary to the decision of the trial court. *See,* Appellant's Brief at pp. 16 & 22 9. In *Romano v. Rockwell International, Inc.,* 59 Cal.Rptr.2d 20 (Cal. 1996), the California Supreme Court rejected the rule announced by the United States Supreme Court in *Delaware State*

College and instead held that the limitations period commences at the time of actual termination, whether or not unequivocal notice of the termination is received prior to that date. 59 Cal.Rptr.2d at 26-27. The *Romano* Court reached this conclusion by treating the notice of termination as an anticipatory breach. *Id.* On December 6, 1988, Romano was notified orally by Collins, his immediate supervisor that the president of the division in which Romano was employed wanted his employment terminated. Collins presented Romano the option of taking a one-year teaching position that would allow Romano to acquire enough "service points" with the company to qualify for early retirement. If Romano accepted the teaching position, he would be expected to retire from the company on May 31, 1991, when he had obtained the necessary number of points. Romano did not begin the teaching position until June 1, 1990 and retired on May 31, 1989. 59 Cal.Rptr.2d at 22. Thus, almost two and one-half years passed between the oral notification to Romano and when his employment terminated. Under these facts, it is not surprising that the California Supreme Court concluded that the notice to Romano in December of 1988 created only an anticipatory breach.

In *Mullins v. Rockwell International Corp.,* 63 Cal.Rptr.2d 636 (Cal. 1997), the California Supreme Court applied that same rule to the commencement of the limitations period in a constructive discharge case. The Court of Appeals in *Mullins* concluded that

the plaintiff's action was barred because he was on notice of the intolerable working conditions before he actually terminated his employment. The California Supreme Court reversed, holding that the statute of limitations runs from the date of actual termination in any action for breach of an employment contract, including claims for constructive discharge. 63 Cal.Rptr.2d at 643.

The Oregon Supreme Court reached a similar conclusion in the context of a constructive discharge case in *Stupek v. Wyle Laboratories Corp.*, 963 P.2d 678 (Or. 1998). The *Stupek* Court, however, based its decision on the elements of a wrongful discharge claim:

> A wrongful-discharge claim has two elements: "[T]here must be a discharge, and that discharge must be 'wrongful.' "*Moustachetti v. State of Oregon,* 319 Or. 319, 325, 877 P.2d 66 (1994), *citing Nees v. Hocks,* 272 Or. 210, 218, 536 P.2d 512 (1975). **The legal injury in a wrongful-discharge claim is the discharge.** *Moustachetti,* 319 Or. at 325, 877 P.2d 66. **Thus there is no claim until the discharge occurs**.

963 P.2d at 681 (emphasis added). Based on that definition, the *Stupek* Court concluded that a claim for constructive discharge does not accrue until the employee actually leaves the employment as a result of the wrongful working conditions. The Court concluded that "[b]efore leaving the employment, the employee is unable to establish the element of discharge." 963 P.2d at 682. In the case at bar, the element necessary to establish a claim

for breach of contract was the breach. On December 9, 1997, all the elements of a breach of contract action had occurred and the claim had accrued. Thus, neither *Mullins* nor *Stupek* should be controlling here.

The California approach is inconsistent with Utah law on the accrual of a claim for breach of contract. The breach of an employment contract occurs upon receipt of an unequivocal notice of termination. This is particularly true in a case like the present where the last day of employment coincides with the Notice of Termination. At that time, the employee cannot claim that the breach is merely anticipatory. Clarke was terminated and removed from the Living Scriptures premises on December 9, 1997. If the termination constituted a breach of the Agreement, that breach occurred on December 9, 1997.

Furthermore, the California rule would discourage employers from being generous with their former employees. There are many instances when an employer will terminate the employment relationship but continue to provide benefits. The courts should encourage this behavior rather than punishing it by extending the statute of limitations. The natural result of such a rule will be for employers to terminate the benefits and employment immediately. As the Third Circuit explained in *Bonham*, "we would also view with disfavor a rule that penalizes a company for giving an employee periodic

severance pay or other extended benefits after the relationship has terminated rather than severing all ties when the employee is let go." 569 F.2d at 191-92. *See also, Naton,* 649 F.2d at 695 ("[A] rule focusing on the date of termination of economic benefits might dissuade an employer from extending benefits to a discharged employee after the employee had ceased working.").

Finally, Clarke had all the information necessary to file his claim for breach of contract on December 9, 1997. Yet, he waited over six years to file the Complaint in this action. In the interim it is almost certain that memories have faded, witnesses have become unavailable, and Living Scriptures has generally been put in a less advantageous position in terms of defending against the Complaint. The Utah legislature adopted a limitations period for breach of a written contract that is six years. *See,* UTAH CODE ANN. § 78-12-23. That period is one of the longest available for any cause of action. *Compare,* § 78-12-23, *with,* § § 78-12-10. The legislature also adopted a rule for the commencement of the limitations period based upon the accrual of the action. *See,* UTAH CODE ANN. § 78-12-1. A claim for breach of contract accrues at the time of the breach. *See, e.g., S & G,* 913 P.2d at 740 ("A contract action ordinarily accrues at the time of the breach").

A decision to extend the time for filing a claim for breach of contract more than six years after the breach would be contrary to the intent of the legislature.

> Such a view would clearly undermine the purposes behind statues of limitations. *See, e.g., Vigos v. Mountainland Builders, Inc.,* 2000 UT 2, ¶ 22, 993 P.2d 207 ("**Statutes of limitations are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur.**"); *Horton v. Goldminer's Daughter,* 785 P.2d 1087, 1091 (Utah 1989) ("In general, **statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.**").

Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 449 UT Adv. Rep. 3, ¶ 13, 52 P.3d 1133, 1136 (Utah 2002). *See also, Hirtler v. Hirtler,* 566 P.2d 1231, 1231-32 (Utah 1977) (finding waiver of statute of limitations in promissory note void as against public policy). The *Hirtler* Court noted that limitations periods are designed not just for individuals, but also for the public good and are "intended to prevent the revival and enforcement of stale demands; against which it may be difficult to defend, because of lapse of time, fading memory, and possible loss of documents." *Id.* Clarke had six full years after he was fired and marched out the door to bring his claim against Living Scriptures. He did not file his action before the limitations period expired and it is barred as a matter of law.

F. The Limitations Period Was Not Extended or Tolled.

Finally, Clarke argues that he compiled a list of pending and unfinished business after he received the Notice of Termination and that this somehow tolled the running of the statute of limitations. *See,* Appellant's Brief, at p. 7, ¶ 10 & p. 10. That argument is without merit. First, there is no evidence to support this assertion. The Complaint does not contain an allegation about Clarke's behavior after he left Living Scriptures on December 9, 1997. [R. 1-17.] Furthermore, despite Clarke's reference to an affidavit in his Opposition brief below, none was ever filed. [*Compare,* R. 54, *with* R. 1-85.] Even if there were competent evidence of Clarke's post-December 9th behavior, it would not change the result.

In *Wilkerson v. Siegfried Insurance Agency, Inc.,* 621 F.2d 1042 (10th Cir. 1980), the Tenth Circuit Court of Appeals rejected a similar argument. Wilkerson brought an action against Siegfried Insurance, claiming that she had been terminated in violation of federal age and sex discrimination statutes. Siegfried obtained a summary judgment ruling in its favor on the grounds that Wilkerson had not filed a notice of intent to sue with the Department of Labor within 180 days of the alleged unlawful practice. Wilkerson appealed, claiming that although she was advised her employment had been terminated and she ceased her employment on March 14, 1975, she was actually carried

on the books as an employee for purposes of benefits until May 16, 1975. She also claimed that she performed some additional activities on behalf of Siegfried Insurance after March 14th. The Tenth Circuit rejected Wilkerson's argument, stating:

> In the instant case, the affidavits, in our view, clearly establish that Wilkerson was discharged on March 14, 1975. Under the authorities, the fact that she was kept on the payroll until May 16, 1975, because of vacation and severance pay rights does not alter that fact. **Nor does the fact that she may have done some incidental work after March 14, 1975, apparently in connection with her leaving, change the situation.** In our view, there is no genuine issue of fact as to when Siegfried discharged Wilkerson. As indicated, if Wilkerson was discharged on March 14, 1975, it is agreed that none of the notices later filed by Wilkerson was timely filed. Under such circumstances, the trial court did not err in entering summary judgment on the issue in the case.

621 F.2d at 1044-45 (emphasis added). Likewise, even if Clarke could point to some evidence that he may have done some incidental work after December 9, 1997, apparently in connection with his leaving, it would not change the situation here. Clarke's employment was terminated and his association with Living Scriptures ended on December 9, 1997. If that termination breached Clarke's written Agreement it did so as of that date. Clarke did not file his breach of contract claim within six years of the breach and it is barred.

VII. CONCLUSION

The Utah legislature has determined that the statute of limitations for breach of written contract is six years. That body has also indicated that the limitations period begins to run at the time the cause of action accrues. In Utah, a breach of contract action, unlike one in tort, accrues at the time of the breach, even if damages are not then ascertainable. By his own admission in the allegations of the Complaint, Clarke was fired on December 9, 1997. If the termination of his employment was a breach of the written Agreement with Living Scriptures, that breach occurred on December 9, 1997. By Utah statute, he had six years from that breach to bring his claim for breach of the Agreement. Clarke did not file within the statutory time-frame and his action is barred by the applicable limitations period. The trial court was correct in dismissing the Complaint and the Order of Dismissal should be affirmed.

Respectfully submitted this 8 day of November, 2004.

PARR WADDOUPS BROWN GEE & LOVELESS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8 day of November, 2004, a true and correct copy of the foregoing, BRIEF OF APPELLEE, LIVING SCRIPTURES, INC., was delivered by placing a true and correct copy of the same in the United States mail, postage prepaid and addressed to the following:

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